

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §§39.13 and 39.103, concerning public notice.

#### EXPLANATION OF PROPOSED RULES

The primary purpose of the proposed amendments is to revise the state rules to reflect certain federal hazardous waste regulations relating to public participation. These proposed rules are intended to provide earlier opportunities for public involvement in the hazardous waste permitting process and expand public access to information throughout the permitting process and the operational lives of certain hazardous waste management facilities. The proposed amendments include, for certain hazardous waste facility permit applications, requirements relating to pre-application public meeting and notice, requirements concerning public notice that a Part B hazardous waste permit application has been submitted, and requirements for information repositories. The proposed amendments also include a clarification to the requirements for publishing notice of draft permit for industrial and hazardous waste facilities. The proposed amendments reflecting federal public participation regulations are needed to establish equivalency with federal regulations and will enable the State of Texas to retain authorization to operate aspects of the federal hazardous waste program in lieu of the United States Environmental Protection Agency (EPA). The federal regulations upon which the proposed rules are based are found at 40 Code of Federal Regulations (CFR) Part 124, Subpart A, which relates to public notice of permit actions and public comment period, and Subpart B, which relates to specific procedures applicable to hazardous waste permits.

Proposed §39.13(a)(7) contains a revision to conform to 40 CFR §124.10(c)(1)(x), which requires notice to local agencies. The proposed revision is the addition of the word “local” to the list of agencies for which notice is required, and the addition of the reference to the federal regulation.

The proposed amendments to §39.103 concern applications for hazardous waste facility permits. The proposed changes to §39.103(a)-(b) and §39.103(g) reflect the corresponding federal regulations which were promulgated by EPA on December 11, 1995, at 60 FedReg 63417. Under proposed §39.103(a), the word “requirements” would be added after “preapplication,” and “local review committee process” would be deleted from the title of this subsection because the proposed subsection contains new pre-application requirements in addition to the portion dealing with the local review committee process. Proposed new §39.103(a)(2) specifies that certain hazardous waste permit applicants must meet the requirements of 40 CFR §124.31(b)-(d), relating to pre-application public meeting and notice, which is proposed to be adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417. Under 40 CFR §124.31(b), prior to submission of a part B hazardous waste permit application for a facility, the applicant must hold at least one meeting with the public in order to solicit questions and inform the community of proposed hazardous waste management activities. The applicant must also post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses. Under 40 CFR §124.31(c), the applicant must submit a summary of the meeting, the list of attendees and their addresses, and copies of any written comments or materials submitted at the meeting to the executive director as part of the part B application. Under 40 CFR §124.31(d), the applicant must provide public notice of the pre-application meeting at least 30 days prior to the meeting, in accordance with §124.31(d)(1)-(2), and the applicant must maintain

documentation of the notice and provide it to the executive director upon request. The requirements of §124.31(d)(1) include a newspaper advertisement, a visible and accessible sign, a broadcast media announcement, and a notice to the permitting agency. Under §124.31(d)(2), these notices must include the date, time, and location of the meeting; a brief description of the purpose of the meeting; a brief description of the facility and proposed operations, including the address or a map (e.g., a sketched or copied street map) of the facility location; a statement encouraging people to contact the facility at least 72 hours before the meeting if they need special access to participate in the meeting; and the name, address, and telephone number of a contact person for the applicant. The applications to which proposed new §39.103(a)(2) applies are hazardous waste part B applications for initial (i.e., original) hazardous waste facility permits authorizing hazardous waste management units, hazardous waste part B permit applications for major amendments, and hazardous waste part B applications for renewals of permits, where the renewal application is proposing a significant change in facility operations. The requirements of this proposed paragraph would not apply to an application for permit correction, minor amendment, or modification, or to an application that is submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility, unless the application is also for an initial permit for hazardous waste management unit(s) or for renewal of the permit where the renewal application is proposing a significant change in facility operations. For the purposes of this proposed paragraph, a “significant change” is any change that would qualify as a class 3 permit modification under 30 TAC §305.69, relating to solid waste permit modification at the request of the permittee.

Proposed §39.103(b) contains additional language relating to notice of receipt of application for hazardous waste part B applications for initial (i.e., original) hazardous waste facility permits authorizing hazardous waste management units, for hazardous waste part B permit applications for major amendments, and for hazardous waste part B applications for renewal of permits, stating that the chief clerk shall provide notice to meet the requirements of subsection (b) and 40 CFR §124.32(b), which is proposed to be adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417. Under 40 CFR §124.32(b)(1), public notice that a part B application has been submitted and is available for review is required to be mailed to any unit of local government having jurisdiction over the area where the facility is proposed to be located, to each state agency having any authority under state law with respect to the construction or operation of such facility, and to persons on a mailing list developed by the chief clerk, including those who request in writing to be on the list; soliciting persons for area lists from participants in past permit proceedings in that area; and notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and state funded newsletters, environmental bulletins, or state law journals. Also, the mailing list may be updated from time to time by requesting written indication of continued interest from those listed, and deleting from the list the name of any person who fails to respond to such a request. Under 40 CFR §124.32(b)(2), the notice must be published within a reasonable time after the application is received by the executive director, and must include the name and telephone number of the applicant's contact person; the name and telephone number of the commission's contact office; a mailing address to which information, opinions, and inquiries may be directed throughout the permit review process; an address to which people can write in order to be put on the facility mailing list; the location where copies of the permit application and any supporting

documents can be viewed and copied; a brief description of the facility and proposed operations, including the address or a map of the facility location on the front page of the notice; and the date that the application was submitted. Also under §39.103(b), additional language is proposed for hazardous waste part B applications for initial (i.e., original) hazardous waste facility permits authorizing hazardous waste management units, for hazardous waste part B permit applications for major amendments, and for hazardous waste part B applications seeking renewal of permits, which states that the executive director must meet the requirements of 40 CFR §124.32(c), which is proposed to be adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417, which requires the executive director, concurrent with the notice required under 40 CFR §124.32(b), to place the permit application and any supporting documents in a location accessible to the public in the vicinity of the facility or at the permitting agency's office. To clarify the applicability, and to conform to the federal regulation at 40 CFR §124.32(a), it is proposed that the requirements of this paragraph relating to 40 CFR §124.32(b)-(c) would not apply to an application for minor amendment, correction, or modification, or to an application that is submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility, unless the application is also seeking an initial permit for hazardous waste management unit(s) or the application is also seeking renewal of the permit.

Proposed §39.103(d)(1) clarifies that the rules concerning notice of draft industrial or hazardous waste facility permit apply to both existing and proposed facilities, by removing the word "proposed." The rule would require the applicant for an industrial or hazardous waste facility permit to publish notice at

least once in a newspaper of general circulation in the county in which the facility is located and in each county and area adjacent or contiguous to each county in which the facility is located.

Proposed §39.103(g) concerns information repositories and states that the requirements of 40 CFR §124.33(b)-(f), which is proposed to be adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417, apply to all applications for hazardous waste permits. Under 40 CFR §124.33(b)-(f), the executive director may assess the need, on a case-by-case basis, for an information repository. When assessing such a need, the executive director must consider a variety of factors, including the level of public interest; the type of facility; the presence of an existing repository; and the proximity to the nearest copy of the administrative record. Then, if the executive director determines that there is a need for a repository, the executive director must notify the facility that it must establish and maintain an information repository, which must contain all documents, reports, data, and information deemed necessary by the executive director to fulfill the purposes for which the repository is established, with the condition that the executive director will have the discretion to limit the contents of the repository. The information repository is to be located and maintained at a site chosen by the facility, but the executive director shall specify a more appropriate site if the executive director finds the site chosen by the facility to be unsuitable for the purposes and persons for which it was established, due to problems with the location, hours of availability, access, or other relevant considerations. The executive director must specify requirements for informing the public about the information repository, by at a minimum requiring the facility to provide written notice about the repository to all individuals on the facility mailing list. The facility owner and/or operator is responsible for maintaining the repository with appropriate information throughout a time period

specified by the executive director. Finally, the executive director may close the repository at his or her discretion, based on the level of public interest; the type of facility; the presence of an existing repository; and the proximity to the nearest copy of the administrative record.

#### FISCAL NOTE

Jeffrey Horvath, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect, there will be no significant fiscal implications for state or local government as a result of administration or enforcement of the sections. The fiscal implications for affected facilities are also considered to be insignificant in relation to the costs of operating and maintaining such facilities, estimated by EPA to be approximately \$5,000 to \$14,000 total cost per facility (see 60 FedReg 63429).

#### SMALL BUSINESS ANALYSIS

The rulemaking deals with enhanced public participation and notice requirements which involve public access to information and notice as it applies to certain industrial and hazardous waste management facilities. Texas Government Code Chapter 2006 requires the commission to consider the cost of complying with rules enacted under the commission's rulemaking power and any adverse effect the rulemaking has on small businesses. The relative cost to small businesses to comply with this rulemaking may be greater than the cost required for large businesses in the same trade, based on the cost per employee, hour of labor, or each \$100.00 of sales. The proposed rulemaking imposes requirements that consist of a pre-application meeting, newspaper notice, visible and accessible signs, and broadcast announcements, estimated by the EPA to be no more than approximately \$5,000 to

\$14,000 total cost per facility. The level of public participation and notice required by the rulemaking does not vary according to the size of the business, but the relative cost to a small business will be more than that for a large business because the expense of complying will be distributed over a smaller number of employees, fewer hours, or fewer dollars in sales.

Section 2006.002 of the Government Code requires an agency considering adoption of a rule that would have an adverse economic effect on small business to reduce the effect of the rule if doing so is legal and feasible considering the purpose of the statute under which the rule is to be adopted. The proposed rulemaking is required to establish equivalency with federal regulations thereby enabling the State of Texas to retain authorization to operate certain aspects of the federal hazardous waste program in lieu of the EPA. While the adoption of the proposed rules may have a relative adverse economic effect on certain businesses, including small businesses, the commission is unable to reduce the effect of the rule because the requirements of the rulemaking are mandated by federal law.

#### **PUBLIC BENEFIT**

Mr. Horvath has also determined that for the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcement of and compliance with the sections will be to provide earlier opportunities for public involvement in the hazardous waste permitting process, to expand public access to information throughout the permitting process and the operational lives of certain hazardous waste management facilities, and to provide enhanced consistency between federal and state waste regulatory requirements. The proposed amendments generally incorporate existing

federal regulations and clarify certain state rules. There are no significant economic costs anticipated to any person, including any small business, required to comply with the sections as proposed.

#### DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking is not a major environmental rule because it is not proposed with the specific intent of protecting the environment or reducing risks to human health or the environment. The specific intent of the rule is to provide earlier opportunities for public involvement with regard to authorization of certain hazardous waste management activities and expand public access to information throughout the permitting process and the operational lives of certain hazardous waste management facilities. In addition, the rulemaking is not a major environmental rule because it will not adversely affect in a material way the aforementioned aspects of the state because the rule simply updates the state's hazardous waste regulations by revising the rules to conform to certain federal hazardous waste regulations, adding enhanced public participation procedures. The rulemaking is specifically required by federal law because states such as Texas that are authorized to administer and enforce the RCRA program in lieu of EPA under §3006 of RCRA are required to modify their programs by adopting equivalent requirements, as necessary. The

delegation agreement between the commission and EPA expressly requires the commission to maintain RCRA authorization. Finally, this rulemaking is not being proposed or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed rules is to provide earlier opportunities for public involvement in the hazardous waste permitting process, to expand public access to information throughout the permitting process and the operational lives of certain hazardous waste management facilities, to provide enhanced consistency between federal and state waste regulatory requirements, to clarify certain state rules, and to ensure that Texas' state hazardous waste rules are equivalent to the federal regulations after which they are patterned, thus enabling the state to retain authorization to operate its own hazardous waste program in lieu of the corresponding federal program. The proposed rules will substantially advance this stated purpose by referencing specific federal regulations or by introducing language intended to ensure that state rules are equivalent to the corresponding federal regulations for hazardous waste facilities and by incorporating certain clarifications to the requirements for mailing notice and for publishing notice of draft permit for industrial and hazardous waste facilities. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the proposed language consists of technical corrections and updates to bring certain state hazardous waste regulations into equivalence with more recent federal regulations, as well as language which clarifies certain existing requirements, which would increase public participation, thus providing the

benefits of earlier opportunities for public involvement and expanded public access to information throughout the permitting process and the operational lives of certain hazardous waste management facilities. These requirements would give applicants a better opportunity to address public concerns in making decisions about the facility and in subsequent permitting activities. The permitting process will be streamlined in some cases, since the public will raise issues, and the applicant can address the issues, at an earlier stage in the process. This earlier involvement may well reduce costs associated with delays, litigation, and other consequences of dispute. The subject regulations do not affect a landowner's rights in private real property because this rulemaking does not restrict or limit the owner's right to property that would otherwise exist in the absence of the regulations, because a property owner may continue to use the property for the management of hazardous waste. In other words, since these rules merely revise public participation and notice requirements, they do not restrict the owner's right to property. Also, the following exception to the application of Chapter 2007 of the Texas Government Code, listed in Texas Government Code, §2007.003(b), applies to these rules: this action is reasonably taken to fulfill an obligation mandated by federal law. See Title 40 CFR §271.21(e)(1), which states that as the federal hazardous waste program changes, authorized state programs such as the commission's hazardous waste program must be revised to remain in compliance with 40 CFR Part 271, Subpart A.

#### COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rulemaking and found that the proposal is a rulemaking subject to the Coastal Management Program (CMP) and must be consistent with all applicable goals and policies of the CMP. The commission has prepared a consistency determination for the proposed rule

pursuant to 31 TAC §505.22 and has found that the proposed rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goals applicable to the rulemaking are to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). CMP policies focus on construction and operation of solid waste treatment, storage, and disposal facilities such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code Annotated, §§6901 et seq.

Promulgation and enforcement of this rule is consistent with the applicable CMP goals and policies because the proposed rule amendments merely update and enhance the commission's rules concerning public participation in the hazardous and industrial solid waste area by providing earlier opportunities for public involvement and by expanding public access to information throughout the permitting process. These rules do not address protection, preservation, restoration, or enhancement of the diversity, quality, quantity, functions, or values of CNRAs, nor do they relate to the authorization of construction and/or operation of solid waste treatment, storage, or disposal facilities. Thus, the proposed rule does not violate any applicable provisions of the CMP's stated goals and policies, because there are no applicable CMP goals or policies that this rule could violate. The commission invites public comment on the consistency of the proposed rule.

**SUBMITTAL OF COMMENTS**

Written comments may be submitted by mail to Bettie Bell, Office of Policy and Regulatory Development, MC-205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808. All comments must be received by May 10, 1999 and should reference Rule Log No. 97129-039-AD. Comments received by 5:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. For further information, please contact Ray Henry Austin at (512) 239-6814.

#### STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code or other laws of this state; and under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

The proposed amendments implement Texas Health and Safety Code, Chapter 361.

**SUBCHAPTER A : APPLICABILITY AND GENERAL PROVISIONS**

**§39.13**

**§39.13. Mailed Notice.**

(a) When this chapter requires mailed notice under this section, the chief clerk shall mail notice to:

(1) - (6) (No change.)

(7) if applicable, local, state and federal agencies for which notice is required in 40 Code of Federal Regulations (CFR), §124.10(c), as amended and adopted in the CFR through May 2, 1989, at 54 FedReg 18786;

(8) - (14) (No change.)

(b) (No change.)

**SUBCHAPTER B : PUBLIC NOTICE OF SOLID WASTE APPLICATIONS**

**§39.103**

**STATUTORY AUTHORITY**

The amendments are proposed under Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code or other laws of this state; and under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

The proposed amendments implement Texas Health and Safety Code, Chapter 361.

**§39.103. Application for Industrial or Hazardous Waste Facility Permit.**

(a) Preapplication requirements [local review committee process].

(1) If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. If the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a

copy of the notice shall also be mailed to the mayor of the municipality. Mailed notice shall be by certified mail. When the applicant submits the notice of intent to the executive director, the applicant shall publish notice of the submission in a paper of general circulation in the county in which the facility is to be located.

(2) The requirements of this paragraph are set forth at 40 CFR §124.31(b)-(d), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417, and apply to all hazardous waste part B applications for initial permits for hazardous waste management units, hazardous waste part B permit applications for major amendments, and hazardous waste part B applications for renewal of permits, where the renewal application is proposing a significant change in facility operations. For the purposes of this paragraph, a “significant change” is any change that would qualify as a class 3 permit modification under §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). The requirements of this paragraph do not apply to an application for minor amendment under §305.62 of this title (relating to Amendment), correction under §50.45 of this title (relating to Corrections to Permits), or modification under §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee), or to an application that is submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility, unless the application is also for an initial permit for hazardous waste management unit(s), or the application is also for renewal of the permit, where the renewal application is proposing a significant change in facility operations.

(b) Notice of receipt of application. When the executive director receives an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located, and to the persons listed in §39.13 of this title (relating to Mailed Notice). For all hazardous waste part B applications for initial permits for hazardous waste management units, hazardous waste part B permit applications for major amendments, and hazardous waste part B applications for renewal of permits, the chief clerk shall provide notice to meet the requirements of this subsection and 40 Code of Federal Regulations (CFR) §124.32(b), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417, and the executive director shall meet the requirements of 40 CFR §124.32(c), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417. The requirements of this paragraph relating to 40 CFR §124.32(b)-(c) do not apply to an application for minor amendment under §305.62 of this title (relating to Amendment), correction under §50.45 of this title (relating to Corrections to Permits), or modification under §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee), or to an application that is submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility, unless the application is also for an initial permit for hazardous waste management unit(s), or the application is also for renewal of the permit.

(c) (No change.)

(d) Notice of draft permit.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area which is adjacent or contiguous to each county in which the [proposed] facility is located.

(2) - (4) (No change.)

(e) - (f) (No change.)

(g) Information repository. The requirements of 40 Code of Federal Regulations (CFR) §124.33(b)-(f), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417, apply to all applications for hazardous waste permits.

(h) [(g)] This section does not apply to applications for an injection well permit.